

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Michael S. McManus

Bankruptcy Judge

Modesto, California

July 31, 2000 at 10:00 a.m.

1. 00-91110-A-7 JIJIBHOY & SILLOO PATEL

HEARING ON ORDER TO
SHOW CAUSE RE DISMISSAL,
CONVERSION OR IMPOSITION OF
SANCTIONS FOR FAILURE OF
DEBTORS AND/OR DEBTORS'
ATTORNEY TO FILE SCHEDULES
A-J; STATEMENT OF FINANCIAL
AFFAIRS; AND ATTORNEY'S
DISCLOSURE OF COMPENSATION
6/26/00 [24]

Tentative Ruling: On March 22, 2000, the debtors filed a chapter 13 petition. The chapter 13 trustee filed a motion to dismiss based on the failure to file schedules and statement of financial affairs. On May 31, 2000, the court granted the motion but gave the debtors 7 days to convert the case to chapter 7. On June 6, 2000, the debtors filed a motion to convert their case chapter 7, but again did not file their schedules or statement of financial affairs. On June 26, 2000, the clerk issued an order to show cause re dismissal or conversion or imposition of sanctions. On June 26, 2000, the debtors filed the missing documents.

This case shall remain pending. The debtors have filed the missing documents. It appears, however, that the debtors have abused the benefits accorded them under the bankruptcy code. They waited more than three months to file documents that were due 15 days after the date of the petition. See Fed.R.Bankr.P. 1007(b)(1) & (c). The debtors are sanctioned \$100.00 for failure to file timely documents. Failure to pay this sanction within 10 days of entry of an order on this matter may result in additional sanctions. Further, if they fail to appear at the first meeting of creditors, the case will be dismissed without further notice of hearing.

2. 00-92423-A-7 JORGE & ROSA DURON

HEARING ON ORDER TO
SHOW CAUSE RE DISMISSAL,
CONVERSION OR IMPOSITION OF
SANCTIONS FOR FAILURE OF THE
DEBTORS AND/OR DEBTORS'
ATTORNEY TO FILE SUMMARY OF
SCHEDULES
7/7/00 [6]

Final Ruling: On June 21, 2000, the debtors filed a chapter 7 petition. They did not file a summary of schedules. On July 7, 2000, the clerk issued an order to show cause why this case should not be dismissed, etc., for failure to file documents required by Fed.R.Bankr.P. 1007(b)(1) & (c). The missing document was filed on July 25, 2000. The case shall remain pending.

3. 00-92054-A-7 TIMOTHY C. GIBBS HEARING ON ORDER TO
SHOW CAUSE RE DISMISSAL,
CONVERSION OR IMPOSITION OF
SANCTIONS FOR FAILURE OF THE
DEBTOR AND/OR DEBTOR'S
ATTORNEY TO ATTEND THE
SECTION 341 MEETING ON
JUNE 22, 2000
6/29/00 [6]

Tentative Ruling: On May 26, 2000, the debtor filed a chapter 7 petition. The first meeting of creditors was scheduled for June 22, 2000. The debtor did not appear. The meeting was continued to July 13, 2000. The trustee has not yet filed a report from that date. This case shall remain pending on the condition that the debtor attended the rescheduled meeting of creditors on July 13, 2000. If the debtor failed to attend the rescheduled meeting of creditors on July 13, 2000, the case shall be dismissed without further notice or hearing.

4. 99-93806-A-7 JOE SCOTT CONT. HEARING ON CLAIMANT'S
MDM #1 OBJECTION TO PROPERTY
CLAIMED AS EXEMPT
3/22/00 [30]

Tentative Ruling: The objection is overruled. On February 24, 2000, the trustee filed an objection to one of the debtor's exemption on February 24. It is the next matter on calender. On March 22, 2000, creditor Teresa McCarter filed an objection *to the same claim of exemption using the trustee's motion control number*. She set the matter for hearing on March 27, 2000. The hearing was continued to this date. While the chapter 7 trustee has an objection to the exemption pending, it has not been set for hearing and only Ms. McCarter's objection is disposed of by this ruling.

She objects to the amendment of the debtor's Schedule C to change the exemption on the debtor's residence from Cal. Civ. Pro. Code § 703.140(b)(5) to Cal. Civ. Pro. Code § 704.720. The objection is based on the assertion that the debtor continues to receive rental income from properties that he stated he would surrender on his amended statement of intentions. In his original schedules, filed on September 14, 1999, the debtor scheduled only his residence. He made no reference in the schedules or statement of financial affairs to any other real property.

On October 8, 1999, he filed amended schedules and statement of

financial affairs. In his statement of intentions, the debtor stated that he would surrender two pieces of real property, commonly known as 2033 S. Union Street, Stockton California, and 2051 S. Union Street, Stockton, California. The debtor has amended his schedules two additional times, but in neither case has he scheduled these two properties. Furthermore, he has not disclosed any income that he may have received pre-petition or post-petition from rental of the properties.

The fact that the debtor receives, or did receive, rental income from properties that were, or have not been, disclosed is not a reason to disallow a claim of exemption in another property that was scheduled.

5. 99-93806-A-7 JOE SCOTT
MDM #1

HEARING ON TRUSTEE'S
OBJECTION TO PROPERTY
CLAIMED AS EXEMPT
2/24/00 [23]

Tentative Ruling: The objection is sustained in part. On August 26, 1999, the debtor filed a petition under chapter 7. He scheduled real property commonly known as 2033 South Union Street, Stockton, California as property of the estate, designating it as his residence. He scheduled the value of the property as \$90,000. He scheduled a first deed of trust in the amount of \$60,000.00 in favor of Bank of Stockton. He scheduled a second deed of trust on the 2033 property in favor of Tangela Guy in the amount of \$45,000.00.

On September 21, 1999, the first meeting of creditors was held. The trustee continued the meeting to October 19, 1999, and noted that the debtor would file new schedules. In his amended schedules, the debtor listed the fair market value of the property at \$72,000. He used the set of exemptions under Cal. Civ. Pro. Code § 703, *et seq.* He claimed the property exempt in the amount of "\$0.00x". He listed the following mortgage liens on the property.

	Amount	Claim Date
American General Finance, Inc.	\$ 22,454.00	10/1/99
American General Finance, Inc.	\$ 32,686.94	10/1/99
Bank of Stockton	\$ 62,000.00	10/1/99
Tangela Guy	<u>\$ 45,000.00</u>	10/1/99
	\$162,140.94	

To summarize:

	Original Scheds. filed on 9/14/99	Amended Scheds. filed on 10/8/99
Fair Market Value	\$90,000.00	\$72,000.00

American General Finance, Inc.	None	\$22,454.00
American General Finance, Inc.	None	\$32,686.00
Bank of Stockton	\$60,000.00	\$62,000.00
Tangela Guy	\$45,000.00	\$45,000.00
Equity	<\$15,000>	<\$90,140.00>

On February 23, 2000, the debtor filed an amended Schedule C to claim the property exempt in the amount of \$75,000.00.

The trustee now objects to the claim of exemption because "the debtor is too late in claiming the exemption. The debtor has evidently decided to claim the exemption after learning that the trustee will challenge the deed of trust he granted to a relative [Tangela Guy] just prior to the filing, a deed of trust which consumed all the equity in the property."

The trustee objects on the grounds that the exemption is late filed. However, a schedule may be amended by the debtor as a matter of course at any time before the case is closed. Fed.R.Bankr.P. 1009(a). This case has not been closed. Therefore, the amendment is timely and the objection on this ground must be overruled.

The trustee also objects on the ground that the debtor amended his claim of exemption because the trustee made it known that he intends to attempt to avoid the alleged transfer of an interest in the property to a relative of the debtor. This does not constitute a basis for denying the claim of exemption. A debtor may claim an exemption in property which apparently contains no equity for the debtor. See Higgins v Household Finance Corp. (In re Higgins), 201 B.R. 965 (B.A.P. 9th Cir. 1996)(permitting the debtor to claim an exemption in property in which he had no equity in order to permit the debtor to avoid a judicial lien under 11 U.S.C. § 522(f)(1)(A).) Further, the fact that the trustee has spent time and money investigating an avoidance action is not sufficient ground to deny the exemption. While dilatory attempts at exemption are sometimes a ground for denying an exemption or requiring the debtor to reimburse the trustee, the cases so holding usually require bad faith or fraud on the part of the debtor. No such showing has been made in this case.

However, if the debtor is attempting, by claiming a \$75,000 exemption in an effort to exempt the equity that may be "freed up" by avoiding the Ms. Guy's deed of trust, the object must be sustained to that limited extent. At present, the equity encumbered by the deed of trust does not exist - it belongs to Ms. Guy. To permit the debtor to exempt the equity encumbered by her deed of trust would run afoul with 11 U.S.C. § 551 & 522(g). Section 551 preserves for the estate any transfer or lien

avoided pursuant the various avoiding powers of the bankruptcy estate. While section 522(g) is an exception to this general rule (it permits the debtor to exempt property recovered by the trustee pursuant to the avoiding powers), the exception is a limited one. The debtor may exempt the recovered property only if the property was not previously voluntarily transferred to the transferee. Ms. Guy received a deed of trust from the debtor. This is necessarily a voluntarily transfer. Therefore, if the deed of trust is avoided by the trustee, the debtor cannot exempt the equity equal to the amount secured by the avoided deed of trust.

6. 98-94833-A-7 JOSEPH & LOURDES MOYA HEARING ON MOTION FOR
AUTHORITY TO COMPROMISE
CONTROVERSY (INSIDER
AVOIDANCE CLAIMS)
7/10/00 [46]

Tentative Ruling: No telephonic appearance is permitted to counsel for the party placing this matter on calendar because it did not include a motion control number as required by the local rules.

The motion is denied without prejudice. The trustee alleges that the debtors own an interest in five entities: (1) Optimum Healthcare, Inc.; (2) United Pharmaceutical; (3) Dialysis and Peresis, Inc.; (4) San Joaquin Transportation Services, Inc.; and (5) KAG Industries. Together, these businesses are referred to in the moving papers as "the Related Entities".

The trustee alleges that the mother of Joseph Moya, Fed.R.Evid. Garbanzos, loaned money to the Related Entities. The debtors apparently do not dispute this allegation, but add that they gave Ms. Garbanzos ownership interests in the Related Entities, as well as security interests in assets of the Related Entities.

The trustee also alleges:

- (1) that the debtors controlled and used the Related Entities as their alter ego(s);
- (2) that the debtors avoided being the title owners of the Related Entities so that their creditors could not reach the assets of the Related Entities;
- (3) that the debtors used the Related Entities to pay their personal bills; and
- (4) The payments from the Related Entities to the debtors and Ms. Garbanzos constituted preferences.

The trustee alleges that the payments to the debtors and Ms. Garbanzos totaled between \$20,000 and \$60,000.

The parties have agreed to settle the dispute. The debtors and Ms. Garbanzos will pay the trustee an aggregate of \$17,500, by way of an immediate payment of \$5,500 and three payments of \$4,000 each in 30-day intervals thereafter. Ms. Garbanzos and the Related Entities will waive any unsecured claim against the estate.

Approval of a compromise must be based upon considerations of fairness and equity. The court may approve a compromise or settlement. Fed.R.Bankr.P. 9019. The court must consider and balance four factors: (1) the probability of success in the litigation; (2) the difficulties, if any, to be encountered in the matter of collection; (3) the complexity of the litigation involved; and (4) the paramount interest of the creditors with a proper deference to their reasonable views. In re Woodson, 839 F.2d 610 (9th Cir. 1988).

The compromise is denied for three reasons. First, the compromise presents a legal non sequitor to the extent that it compromises a preference claim against the debtors. The trustee describes the payments from the Related Entities to the debtors as preferential. If the Related entities are alter egos of the debtors then the transfers represent transfers from the debtors to themselves. If the Related Entities are entities in which the debtors have an ownership interest, then the transfers represent either a return on capital or a return of capital. In either case the transfers increase the property of the estate, not decrease it.

A preferential transfer is, among other things, a transfer to or for the benefit of a creditor. 11 U.S.C. § 547(c). Under any of the foregoing circumstances, the transfers can only be described as constituting transfers of property of the estate to the debtors, not to a creditor. The debtors are not creditors of themselves. Even if all of the trustee's factual allegations are true, the alleged transfers to the debtors cannot be preferential transfers. So, what is being settled with the debtors? It cannot possibly be a preference cause of action. Until the court understands what is being settled it cannot possibly determine whether the settlement passes muster under In re Woodson.

Second, the trustee does not discuss what amount of the \$17,500 represents transfers to the debtors and what amount represents transfers to Ms. Garbanzos. Therefore, the court cannot evaluate the settlement between the estate and Ms. Garbanzos. Therefore, the motion must be denied on this ground.

Third, the trustee has not provided the court with a copy of the settlement agreement. Without it, the court cannot ascertain what "mutual releases" the parties are going grant to each other.

Is the trustee waiving all actions against the debtors and Ms. Garbanzos? Is he waiving all actions against the debtor that concern the Related Entities? What if the debtors possess evidence of ownership of the Related Entities? Is the trustee forever prohibited from compelling the debtors to turn them over to the estate? Is the trustee

conceding that the three Related Entities that were not scheduled are not property of the estate? The court cannot grant the motion without seeing the settlement agreement.

7. 96-91550-A-7 ROBERT & DIANA MCKOWN
CWS #6

HEARING ON MOTION FOR
APPROVAL OF A COMPROMISE
BETWEEN THE ESTATE AND
DEBTORS
7/13/00 [92]

Tentative Ruling: The compromise will be approved. On December 28, 1995, the debtor was terminated by her employer. On April 22, 1996, the debtors filed their petition. On October 30, 1996, the debtor was re-employed.

The debtor brought an action against her former employer. The suit was settled for \$40,000. The debtor earned approximately \$2,385.07 per month at the time she was terminated. The trustee has calculated that the pre-petition time during which the debtor was unemployed constituted \$9,540.28 in lost wages. The post-petition amount of lost wages totals \$14,210.42. The trustee attributes the balance, \$16,149.30, to mental suffering. After fees and costs, the remainder was \$17,469.00.

The trustee has divided this amount on a pro rata basis as follows:

	Amount of Total Award attributable to each category	Approx. percent of total Award	Amount of Net Award attributable to each category
Pre-petition lost wages	\$ 9,540.28	24%	\$ 4,192.56
Post-petition lost wages	\$14,310.42	36%	\$ 6,288.84
Mental Suffering	\$16,149.30	40%	\$ 6,987.60
TOTALS	\$40,000.00	100%	\$17,469.00

While not admitting that the above attribution would be the result of litigation, the trustee believes that if it is accepted, the debtors would be entitled to the post-petition lost wages under Cal. Civ. Pro. Code § 703.140(b)(11)(E). That amount is \$6,288.84.

To this amount must be added the award that the debtors have claimed exempt, \$4,375.00, under Cal. Civ. Pro. Code § 703.140(b)(1)&(5).

Finally, the compromise takes into account the amount that the debtors potentially owe the estate, \$950.00, pursuant to a tentative (not final)

ruling granting sanctions to the estate based on the debtors' failure to appear at a deposition. That amount is to be deducted from the debtors' share of the award.

Post-petition wages:	\$6,288.84
Exemption:	\$4,375.00
Sanctions:	<\$ 950.00>
Total to the debtors:	\$9,713.84

Approval of a compromise must be based upon considerations of fairness and equity. The court may approve a compromise or settlement. Fed.R.Bankr.P. 9019. The court must consider and balance four factors: (1) the probability of success in the litigation; (2) the difficulties, if any, to be encountered in the matter of collection; (3) the complexity of the litigation involved; and (4) the paramount interest of the creditors with a proper deference to their reasonable views. In re Woodson, 839 F.2d 610 (9th Cir. 1988).

The probability of significant marginal success beyond the compromise appears slight. The cost of litigation would consume the expected value of any additional benefit to the estate. Collection is not an issue. The compromise is in the best interest of the creditors of the estate, none of whom have opposed the motion.

8. 00-91852-A-7 RIAZ & GUALFROZE KHAN HEARING ON MOTION TO
CWC #1 EXTEND TIME TO ASSUME OR
REJECT UNEXPIRED LEASE
7/5/00 [9]

Tentative Ruling: The motion is granted. The trustee is granted an extension of time to assume or reject a lease with Rally's Hamburgers, Inc., (the sub-landlord) and TJZ Pacific Corporation (the prime landlord) on the grounds that the trustee has not had sufficient time to determine whether it would benefit the estate to assume or reject the lease. The extension shall be for 60 days from the date that period time would have otherwise expired.

9. 99-93182-A-7 HARPAL & RANBIR GREWAL HEARING ON MOTION FOR
99-9144 ORDER ENTERING JUDGMENT
GURNAM SINGH GILL AND HARINDER S. AGAINST DEFENDANTS BASED ON
GILL VS. DEFENDANTS' DEFAULT OF
STIPULATED JUDGMENT
7/14/00 [51]

Tentative Ruling: The motion for an order entering judgment is denied. On August 27, 1999, the plaintiffs filed a complaint against the defendants. On July 11, 2000, a stipulated and order for settlement & judgment was entered on docket. The judgment is now final and non-appealable.

The judgment provided that the defendant owed the plaintiffs \$15,000 and that this was non-dischargeable. It further provided that the

defendants would pay the judgment in installments. \$2,500 was to be paid on or before June 20, 2000, and the balance was to be paid with 7% interest over 60 months by way of payments in the amount of \$247.51. If the defendants defaulted and failed to cure within 10 days of demand, the plaintiffs would have the "right to enforce the judgment for the remaining balance at the time of the default."

On July 14, 2000, the plaintiff filed a MOTION FOR ORDER ENTERING JUDGMENT AGAINST DEFENDANTS BASED UPON DEFENDANTS' DEFAULT OF STIPULATED JUDGMENT. The motion is based upon the allegation that the defendants have defaulted under the settlement judgment.

A judgment is the final determination of an action and thus has the effect of terminating the litigation. 10 Charles Alan Wright, Arthur Miller & Mary Kay Kane, Federal Practice and Procedure Civil 2d § 2651 (1998) (and cases cited including Steccone v. Morse-Staret Prods. Co., 191 F.2d 197 (9th Cir. 1951)). Absent unusual circumstances, only one judgment is entered in a case. See Fed.R.Civ.P. 54(b) as incorporated by Fed.R.Bankr.P. 7054. There are no circumstances in this case warranting multiple judgments.

The judgment in this case was not a conditional judgment. Its language clearly indicates that it is both final and unconditional. While it permitted the defendant to pay the judgment in installments, the judgment was nonetheless final and unconditioned. If the defendant failed to make an installment payment, the entire judgment is due. Given the default, the plaintiff is entitled to enforce the judgment. This motion is unnecessary to enforce the judgment. See Fed.R.Civ.P. 69 as incorporated by Fed.R.Bankr.P. 7069.

The judgment is final. There is no need for another judgment. The plaintiffs may take whatever steps are proper under the law to collect the money owed pursuant to the judgment.

10.	99-93182-A-7 HARPAL & RANBIR GREWAL 99-9144 GURNAM & HARINDER GILL VS.	HEARING ON MOTION TO WITHDRAW AS ATTORNEY, ADRIAN S. WILLIAMS 7/17/00 [54]
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Tentative Ruling: The motion is granted. Counsel for the defendants seeks the permission of the court to withdraw representation due to the failure of the defendants remain in contact with him.

The rules concerning withdrawal are liberally construed to protect clients. 1 Witkin, California Procedure, § 100, "Attorney," (1996) (citing Vann v. Shilleh, 54 Cal. App.3d 192, 197 (1975)). The attorney has no right to withdraw until steps have been taken to avoid prejudice to the client's rights. Id. Here, the litigation has been largely concluded. All that remains is collection of the judgment. Counsel has taken the appropriate steps to assist the defendants in this final phase of the case but the defendants have been uncommunicative. The movant may withdraw his representation of the defendants. The order shall

indicate the last known mailing address and telephone number of the defendant and shall provide for the turn over of the file to her upon entry of the order.